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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, a corporation,
O. J. WALLS, d/b/a O. J. WALLS COMPANY,
JOHN D. BAGWELL FARMS AND HATCHERY, INC.,
a corporation,
CITY OF GUNTERSVILLE, ALABAMA,
Petitioners

v.

SOUTHERN RAILWAY COMPANY, a corporation,
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a corporation,
SEABOARD AIR LINES RAILROAD COMPANY, a corporation,
Respondents

PETITIONERS' BRIEF IN REPLY TO BRIEF OF SOUTHERN RAILWAY COMPANY OPPOSING CERTIORARI

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STATEMENT

Southern's brief contains numerous statements of fact which are so foreign to the record and so grossly inaccurate as to suggest that the new counsel may be relying more upon Southern's widely advertised propaganda than upon the evidence adduced in the Court

below and before the I.C.C. Southern's effort to minimize the importance and novelty of the legal issue presented evidences a decided reluctance to face up to one of the most important, and as yet unanswered, legal questions which have grown out of the regulation of rail rates since enactment of the National Transportation Policy. This importance is underscored by the Commission's declaration on January 5, 1962, that issues involved in the suspended rates are of "general transportation importance".[1]

THE RATES INVOLVED

The rates under suspension are not the product of laudatory benevolence as Southern contends. Rather they represent a cold blooded effort to destroy competition and monopolize the grain traffic into the Southeast. Southern is not merely passing on to the public legitimate savings which accrue from genuine technological developments and a "far reaching transportation innovation". Technological progress and transportation innovations have not yet wrought changes in railroading which make it cheaper to haul grain by rail than by barge. And it is not a fact that the destruction of barge transportation, the elimination of waterways as arteries of commerce, and the abandonment of communities, facilities, and industries geared to barge transportation are simply the inevitable results of progress in transportation.

On the contrary, the proposed rates, which are 65% below the level of existing rail rates on which millions

[1] Evidently the other Respondents do not intend to oppose the issuance of the writ. This reply, therefore, is being filed prior to the expiration of the period allowed by Rule 24(1) for filing of Respondents' briefs in opposition to the petition.

of bushels of grain move, are a classic example of that type of selective rate cutting which the National Transportation Policy has outlawed. The proposed rates apply *only* from specified origins on the Ohio and Mississippi Rivers to specified destinations in the Southeastern states and intermediate points; they *do* not apply to rail shipments from the Tennessee River ports and thus discriminate against those ports. They apply *only* to shipments of 450 tons or more; thus, those small businessmen who are unable to receive, unload, store and pay for 450 tons (about 16,000 bushels) of rail grain at one time will be seriously prejudiced *vis a vis* their larger and wealthier competitors.[2] The tariffs provide a $2.40 per ton minimum rate which is absolute up to 346 miles; hence, the short haul shipper is victimized by discriminatory rates which require him to pay the same rate as the long haul shipper.[3] And, contrary to the statement on page 9 of Southern's brief, the rates are not limited to grain in the "Big John" cars. For every other railroad serving the South they would apply to ordinary hopper and standard box cars.

An single example will demonstrate the destructive effect of these rates. In *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam*, 361 U.S. 353 (1960), the three judge court used Orangeburg, S.C. as a typical destination for illustrative purposes. Let us use the same city.

The present rail rate from the Mississippi River port of St. Louis to Orangeburg, a distance of 847

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[2] 376 grain operators in 8 southern states formed an Association soley to protest the proposed rates. Most were concerned about the threat to the small businessman.

[3] See King Aff. P. 49.

miles, is $12.50 per ton. Southern's proposed rate is $5.27. The rail rate from the Tennessee River port of Guntersville, Alabama, to Orangeburg, a distance on only 385 miles, is $6.00 per ton. It would not be changed by the suspended tariffs. Under the suspended rates, if Arrow made the 586 mile barge haul from St. Louis to Guntersville *without charge* and, *in addition*, transferred the grain from barge to rail car *without charge*, the barge-rail movement would still cost the shipper 63 cents per ton more than the all-rail haul (King Aff. R. 50).

The struggle between the barge lines and the railroads is not a struggle between equals. Arrow handles few commodities (of which grain is by far the most important) and these only between river ports. On the other hand, the traffic Southern handles in competition with Arrow is a very small proportion of its total traffic. It can carry this traffic at a loss for the short time necessary to destroy its competition. This is not a new tactic by any means. It has been used before with very great success.[4] If the equity court is impotent,

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[4] In *Petroleum Products from New Orleans, La. Group to Memphis, Tenn. Group River Points* 194 I.C.C. 31 (1933) Commissioner Eastman described this success:

> "The railroads in their early years encountered stiff opposition from many steamboat lines plying upon these waters. They proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.
>
> "This was done by cutting rates where the competition existed, to whatever extent was necessary to paralze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have this reservoir of non-competitive traffic to help them out and hence perished in the unequal struggle (p. 44)."

the tactic can be used again and again, and the competition destroyed while the Commission investigates the lawfulness of the means used to accomplish the destruction. Southern knows this as well as petitioners.

These proposed rates are not, as Southern declares, truck competitive rates. While evidence before the Commission is in conflict, it is clear that Southern has vastly overstated the volume of truck movement The rates when first proposed were aimed at barge transportation.[5] The truckers became the quarry as an after thought.

REPLY TO SOUTHERN'S ARGUMENT

Southern (p. 11) takes solace from the fact that the narrow issue involved here has never arisen before. At the same time, it denies that the issue has novelty. The fact is that the essential issue (whether the court can restrain drastic rate reductions after the suspension period and prior to a final, reviewable Commission order) has arisen twice before and each time was decided adversely to the railroads without appeal to this Court.[6]

In *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281, U.S. 412 (Southern's brief p. 12), the Court, prior to the enactment of the National Transportation Policy, was confronted with a delicate federal/state relationship. The Court took pains to point out that the 10% reduction in intrastate rail rates ordered by the North

[5] In its reply to the petition for suspension, filed August 3, 1961, Southern stated that "The bulk of the grain traffic to the involved area is presently moving by unregulated water transportation, public and private, and to a lesser degree by unregulated trucks."

[6] See page 8, original Petition.

Dakota Commission was not claimed by the railroad to be confiscatory or destructive. Therefore, it refused to interdict the state prescribed rate until the railroad pursued its remedy before the I.C.C.. In the case at bar, however, the rate reductions are both destructive and confiscatory.

Southern urges that in Section 15(7) Congress delicately balanced conflicting interests. This is true as far as it goes. Congress recognized that the railroads would be deprived of revenues from *increased* rates if the suspension period continued for more than 7 months. It intended that they go into effect, subject to refund if the increases were later declared unlawful. There is, however, no evidence of Congressional intent to balance the conflicting interests of competing carriers when the proposal is destructive of competition. Nor is there any sound public policy which dictates that competition be destroyed while the Commission deliberates.

Southern insists, and the Court of Appeals found, that to extend the suspension period is to determine rates in the interim, a legislative function. It should be noted that the Court will legislate by non-action as well as by action; in either event, the interim rates will have been fixed by the exercise or non-exercise of a judicial function. The question is whether Congress intended that the carrier's right to initiate rates be paramount to the Court's right to enjoin if the rates are outside what the Court in *T.I.M.E. Inc.* v. *United States*, 359 U. S. 464 (1959) called the "zone of reasonableness", i.e. will defeat the purpose of Congress, destroy competition, monopolize traffic, and inflict irreparable injury.

Southern's insistence that it will be irreparably injured if it is not permitted to effectuate these drastic rate reductions ignores the fact that maintenance of the *status quo* simply keeps Southern in the same rate position it created for itself years ago, while to permit the rates to go into effect prior to Commission action will utterly destroy petitioners. Southern seeks a new status; petitioners seek to preserve the existing status *pendente lite*.

Southern's lament for "the many shippers and consumers to whom the new rates will be a great boon" has a hollow sound, coming as it does from a railroad which has consistently refused to cooperate with the barge lines in reducing transportation costs on grain into the southeast. Significantly, Southern does not bleed for the other railroads who published the same rates but who obviously are not enthusiastic about the rates and do not anticipate any damages from their continued abeyance. They have not supported the rates before the Commission, and have not opposed granting of the writ. In any event, one fact is crystal clear; the District Court balanced the equities and found them to weigh heavily on the side of petitioners. That Court's memorandum (App. C, R. 73-77) makes it abundantly plain that but for its doubts as to its jurisdiction, it would have issued the *status quo* injunction so as to serve "the ends of justice".

Southern claims that the writ should be denied because the issue may become moot before this Court can decide it. Of course, a degree of potential mootness is inherent in this and every other issue. If the Writ is denied on this ground, however, it is difficult to see how this issue, which is crucial to the preserva-

tion and implementation of the National Transportation Policy, can ever reach this Court for decision.

None of the petitioners seeks freedom from competition. None has or desires a monopoly; hence *Tennessee Power Co.* v. *T.V.A.*, cited on page 15 of Southern's brief, is inapplicable. Petitioners seek protection against unfair, destructive competition—from below-cost rates proposed by its competitor. Southern has never claimed, either before the Commission or before the Courts, that the proposed rates will pay the full cost.

CONCLUSION

For the reasons heretofore stated, the Petition should be granted.

Respectfully submitted,

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